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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 974

ART NATIONAL MANUFACTURERS DISTRIBUTING CO., LOUIS WATCH CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 17–19) is reported at 298 F. 2d 476. The opinion and order of the Federal Trade Commission (Pet. 20–31) have not been officially reported.

JURISDICTION

The decree of the court of appeals, affirming and enforcing the Commission's order, was entered on February 9, 1962 (Pet. 31–33). By orders of Mr. Justice Harlan, dated April 27, 1962, and May 15,

1962, the time for filing the petition for a writ of certiorari was extended to May 16, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 15 U.S.C. 45(g)(2), (h), and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is substantial evidence in the record to support the finding of the Federal Trade Commission that the regular retail prices of petitioners' "Louis" watches were substantially less than the prices at which they were preticketed.

2. Whether, where the original examiner died during the hearing, it was proper for the Commission to appoint a new examiner and offer petitioners an opportunity to recall all witnesses heard by the original examiner rather than to order a hearing *de novo*.

STATUTES INVOLVED

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a), provides in part:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Section 5(c) of the Administrative Procedure Act, 60 Stat. 239, as set forth in 5 U.S.C. 1004(c), provides:

> (c) Authority and functions of officers and employees. The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. * * *

STATEMENT

The Louis Watch Co. ("Louis") is a manufacturer and distributor of watches. Art National Manufacturers Distributing Co. ("Art National") is a mail order house which retails, and occasionally wholesales, various hard goods including Louis watches. Both corporations are entirely owned and controlled by the Friedman family. Petitioner Louis Friedman controls and directs the business activities of Louis; petitioners Albert Friedman and Martin Friedman control and formulate the policies of Art National (Pet. 24–25):

1. This litigation began when the Federal Trade Commission issued a complaint against petitioners charging that they engaged in "unfair and deceptive acts and practices and unfair methods of competition" in violation of the Federal Trade Commission Act (App. 30a).[1] The complaint alleged that petitioners'

[1] "App." and "Comm'n App." refer, respectively, to the appendices filed by petitioners and the Commission in the court of appeals.

advertisements of their Louis watches contained various false representations. (see App. 28a–29a). It also alleged as a violation petitioners' practice of "attach[ing] tickets to their Louis Watches, setting out prices, thereby representing that the prices thereon are those at which the watches * * * are usually and customarily sold at retail," when "in fact, said prices are in excess of the prices at which said watches are usually and customarily sold at retail and are fictitious" (App. 30a).[2]

During the hearing, witnesses called by the Commission testified that Louis watches were customarily sold for less than 50% of their preticketed prices by independent retailers (Comm'n App. 17a–19a, 27a–31a, 32a–35a), wholesalers (Comm'n App. 35a–36a), and others (Comm'n App. 17a–21a (auctioneers), Comm'n App. 21a–23a (sales by punchboard)), as well as by Art National—which sold "a substantial number of Louis watches * * * to consumers" (Pet. 29–30; see Pet. 9). The examiner found that although Louis watches "sold by Art National" and "a number of peddlers,

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[2] The complaint also alleged that petitioners falsely represented, by means of catalogs, the length of time Art National has been in business; the year in which Louis was established; the size of the offices in which they do business; that Art National sells "at America's lowest prices"; that Louis Watches "have been awarded a Gold Medal," contain "rubies," are "shockproof" and "carry a Full year's written guarantee" (App. 28a–29a). The Commission held that the evidence supported a finding that all but the first of these representations were false (Pet. 28–31) and ordered petitioners to cease and desist therefrom (Pet. 21–22). Petitioners do not here seek review of the enforcement by the court of appeals of this portion of the order.

discount dealers and wholesalers [were sold] at retail for less than the pre-ticketed prices," the record did not contain sufficient evidence to "permit a determination that the usual or customary resale prices were less than the pre-ticketed prices," since all of the witnesses "who operated retail jewelry stores * * * sold [Louis watches] at the suggested resale or pre-ticketed prices" (Pet. 39).[2]

On cross-appeals, the full Commission held that, although "the evidence on this point [was] conflicting" (Pet. 29), the examiner erred in refusing to order petitioners to cease preticketing their Louis watches at fictitious prices (Pet. 30). The Commission noted that the evidence showed that "a substantial number of Louis watches [were] sold to consumers through the medium of the Art National catalog" (Pet. 29), which was "distributed to more than 400,000 addressees" (Pet. 24); and that "the prices charged consumers by Art National * * * were substantially

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[2] The record contains evidence (Comm'n App. 24a-25a) that the Louis watches sold through retail jewelry stores at the preticketed prices were of a higher quality than the Louis watches customarily sold at retail at less than the preticketed prices by outlets other than jewelry stores. An investigator for the Trade Commission testified (Comm'n App. 25a):

> * * * I went in a number of jewelry stores located in downtown Columbus. * * * I was attempting to find some retailer who sold this [Louis] watch in order that I could establish for the record the usual and customary retail price. * * * I was told by these dealers that they did not know of anyone who sold this type of watch; that it is not a type of watch that is sold by jewelers but would probably be sold by a type of operation that would sell the cheaper type of merchandise.

below the suggester [*sic*] retail list, and corresponding ticket, price fixed by Louis" (Pet. 30). It concluded (*ibid.*):

> Under the circumstances of this matter, where one family owns and controls the entire operation, [petitioners] are in a poor position to deny that Louis watches are not pre-ticketed with fictitious prices when they themselves regularly sell the watches to all comers at prices which are only a fraction of said pre-ticketed prices.

Accordingly, petitioners were ordered to cease and desist from the practice of preticketing their "merchandise" with fictitious prices (Pet. 24, 22). On review, the Court of Appeals for the Second Circuit unanimously affirmed, holding that "[t]he record as a whole supports the Commission" (Pet. 19).

2. After hearing the testimony of the first eight witnesses for the Commission, the original examiner died and, over petitioners' objection a substitute examiner was appointed to take his place and continued the hearing (Pet. 19, 27). The new examiner presided during the testimony of the remaining Commission witnesses and the entire defense (Pet. 5) and prepared the initial decision (Pet. 37-41). At his first hearing, he informed petitioners' attorney that "if there is any specific controversy that your think should be brought particularly to my attention, I will permit you the greatest of latitude in recalling any witness that you may desire * * *. Either

for additional cross, or for further cross" (Comm'n App. 11a). Petitioners declined the offer (Pet. 19).[1]

Petitioners took an interlocutory appeal from the order appointing the substitute examiner, which was denied by the Commission (Pet. 24). The same objection was advanced and denied on appeal from the initial decision and in the court of appeals (Pet. 26–27, 19). In so ruling, the Commission held that petitioners had "totally failed to show that the substitution of hearing examiners in any way prejudiced their right to a fair trial" (Pet. 27).

ARGUMENT

The decision below is clearly correct, and the petition presents no question of general importance in the administration of the Federal Trade Commission Act.

1. "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739; *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 117. As pointed out in the Statement, *supra* at p. 4, the fact that Art National retailed a substantial number of Louis watches at prices considerably below the preticketed prices and the evidence

[1] In fact, two of the first eight witnesses retestified before the substitute examiner. Albert Friedman was recalled by the Commission and Louis Friedman also testified as the first and last of the nineteen witnesses called by petitioners (App. ii). Twenty witnesses in all were called by the Commission (App. i–ii).

that other retailers and wholesalers also consistently sold such watches for much less—less than 50%—than the preticketed prices are sufficient to support the Commission's finding that "the pre-ticketed prices were fictitious" (Pet. 29). Moreover, the Second Circuit so found (Pet. 18–19), and this Court has held "that substantiality of evidence on the record as a whole to support agency findings 'is a question which Congress has placed in the keeping of the Courts of Appeals. * * *'" *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.[5]

2. Recently, several courts of appeals have upheld Commission findings that:

> Misrepresentation as to the retail value of merchandise by means of an attached, fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon constitute unfair methods of competition.

Clinton Watch Co. v. *Federal Trade Commission*, 291 F. 2d 838, 840 (C.A. 7), certiorari denied, 368 U.S. 952; *Baltimore Luggage Co.* v. *Federal Trade Commission*, 296 F. 2d 608, 610 (C.A. 4), certiorari denied, April 23, 1962, No. 780, this Term; see *Bankers Se-*

[5] Petitioners' suggestion (Pet. 3, 12) that, in the circumstances of this case, the Commission could not reverse the examiner's finding and substitute its own finding therefor is without merit. It is settled that the Commission is free to reverse findings of a hearing examiner as long as its substitute findings are based upon substantial evidence in the record. *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 363–364; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492, 496–497.

curities Corp. v. *Federal Trade Commission*, 297 F. 2d 403, 405 (C.A. 3). The instant decision is based upon the same principle and, contrary to petitioners (Pet. 7, 11), in no way conflicts with these decisions. The allegation of conflict is, at most, a request that this Court "should decide when a manufacturer's preticketed prices are fictitious" (Pet. 8; footnote omitted). However, it is settled that Section 5 of the Federal Trade Commission Act is violated by false advertising practices that mislead consumers into the belief that they are getting a bargain *when actually they are not*. *Standard Education Society*, *supra*, 302 U.S. at 116-117; see *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 492-493. And a case by case determination of what constitutes false advertising has been appropriately left to the "informed judgment" of the Commission, since it "is experienced and expert in evaluating the impact of advertising practices and in framing equitable advertising requirements that serve the public interest." *Bankers Securities Corp.*, *supra*, 297 F. 2d at 405.

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[1] Petitioners' allegation (Pet. 11) that the cease and desist order is too broad insofar as it forbids the preticketing with fictitious prices of all "merchandise" sold by them is also insubstantial. The record contains evidence that Art National sold other products besides Louis watches for less than their preticketed prices (Comm'n App. 40a) and it purchased all of its products through Louis (Comm'n App. 5a). Therefore, the Commission's proscription of fictitious preticketing practices as to all products sold by petitioners fell well within its "wide discretion" in framing the order. See *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; *cf. Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 363-364. In any

3. Petitioners' contention (Pet. 11–14) that the Commission erred in continuing the hearing and appointing a new examiner after the death of the original examiner runs counter to Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c) (*supra*, p. 3), which makes clear that the original agency decision need not be made by the same officers who presided at the reception of evidence "where such officers become unavailable to the agency." In *Gamble-Skogmo, Inc.* v. *Federal Trade Commission*, 211 F. 2d 106, 117–118 (C.A. 8), (cited at Pet. 12), it was held that Section 5(c) did not authorize a substitute examiner, who had heard none of the testimony, to make the original decision when "it [was] clear" that his conclusion was based "in controlling measure upon the credibility evaluation which he made between the opposing witnesses in their irrecon-

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event, petitioners have waived this argument by failing to raise it before either the Commission or the court of appeals. See *Mogg Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413–414.

The original trial examiner, "before whom all of the testimony in the case had been taken, and who had had the matter duly submitted to him on briefs and oral argument, was thereafter, because of his having reached the age of 70 years * * * and having thus become subject to being automatically retired * * *, treated by the Commission as being legally unavailable * * *" (211 F. 2d at 110). The record showed that the Commission had statutory authority to reemploy the examiner and in fact had done so briefly; and that, following his separation, "he thereupon was taken on as a trial examiner by another government agency" (211 F. 2d at 111). The court, however, refused to hold that the Commission was under a duty to reemploy the examiner or that appellants were entitled to a new hearing because of its failure to do so (211 F. 2d 111–112).

cilable testimony." No such problem is presented here. As noted by the Commission (Pet. 27), petitioners did "not challenge the credibility of these witnesses [who were heard by the deceased examiner] or point to any irreconcilable conflict between their testimony and other evidence." Moreover, as the court of appeals pointed out (Pet. 19), petitioners declined to accept the new examiner's offer of an opportunity to recall any one or all of the witnesses heard by the first examiner. Therefore, they cannot now complain that they were prejudiced by the fact that the substitute examiner did not hear some of those witnesses testify.

CONCLUSION

The decision below is clearly correct and presents no substantial question. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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